

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

File No. 1:04-CR-165

v.

HON. ROBERT HOLMES BELL

WILLIAM EDWARD FLYNN,

Defendant.

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MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant William Edward Flynn's ex parte request for subpoenas for witnesses at government expense pursuant to FED. R. CRIM. P. 17(b). Rule 17(b) requires the Court to order that a subpoena be issued "if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense." FED. R. CRIM. P. 17(b). If a subpoena is issued, the costs and fees are paid in the same manner in which those fees are paid for government witnesses. *Id.*

Defendant has the initial burden of demonstrating that each witness is necessary to an adequate defense. *United States v. Moore*, 917 F.2d 215, 230 (6th Cir. 1990). A witness is necessary if his/her testimony is relevant, material and useful to an adequate defense. *Moore*, 917 F.2d at 230 (citing *United States v. Greene*, 497 F.2d 1068, 1079 (7th Cir. 1974)). The Sixth Circuit has adopted the standard required by the Fifth and D.C. Circuits:

if the accused avers facts which, if true, would be relevant to any issue in the case, the requests for subpoenas must be granted, unless the averments are inherently incredible on their face, or unless the Government shows, either by introducing evidence or from matters already of record, that the averments are untrue or that the request is otherwise frivolous.

United States v. Barker, 553 F.2d 1013, 1020 (6th Cir. 1977) (citing *Greenwell v. United States*, 317 F.2d 108, 110 (D.C. Cir. 1963)). Defendant has been charged with multiple counts of mail fraud and money laundering. Defendant has also been charged with conspiracy to defraud the United States, as well as conspiracy to commit mail fraud and money laundering. Accordingly, Defendant's requested witnesses must be relevant to a defense of these charges. *Moore*, 917 F.2d at 230.

Defendant requests subpoenas for eight witnesses. Defendant has provided a summary of each witness' potential testimony. The Court has reviewed Defendant's request and will grant in part and deny in part subpoenas at the government's expense. The Court is satisfied that Defendant has made a sufficient showing of necessity pursuant to Rule 17(b) for the following witnesses: Dave Federici, Rodney Gross, Thomas Gerbyshak, Richard Steusser, Patrick Rohloff, and Eleazor M. Kadile, M.D.

The Court denies Defendant's request for subpoenas of Dana Spartichino and Dale Atwood. Both witnesses are listed as character witnesses. While Defendant may offer evidence of pertinent character traits pursuant to FED. R. EVID. 404(a)(1), the testimony of these witnesses would be cumulative because Defendant's other witnesses appear able to testify to Defendant's good character. *See United States v. Webster*, 750 F.2d 307, 330 (5th

Cir. 1984); *United States v. Weischedel*, 201 F.3d 1250, 1255 (9th Cir. 2000) ("A district court can properly deny a Rule 17(b) subpoena request when the testimony sought would be cumulative."). Thus, these witnesses are not necessary to Defendant's defense. Moreover, with regard to Mr. Atwood, Defendant has also failed to demonstrate that his testimony is relevant to the charges against him. Accordingly, the requests for subpoenas for Dana Spartichino and Dale Atwood are denied.

IT IS HEREBY ORDERED that Defendant William Edward Flynn's ex parte request for subpoenas for witnesses at government expense pursuant to FED. R. CRIM. P. 17(b) (Docket #398) is **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that subpoenas shall be issued at government expense for the following witnesses:

1. Dave Federici
N7793 Shaffer Rd.
Crivitz, WI 54114
(715) 854-2525
2. Rodney Gross
W12247 Hillside Lane
Crivitz, WI 54114
(715) 757-9416
3. Thomas Gerbyshak
N9808 Deer Lake Rd.
Crivitz, WI 54114
(715) 757-3079
4. Richard Steusser
Eagle Road
Crivitz, WI 54114
(715) 757-2509

5. Patrick Rohloff
Menominee, MI
(906) 864-4425
6. Eleazor M. Kadile, M.D.
Business address:
1538 Belleview St.
Green Bay, WI 54311
(920) 468-9442
Home address:
5613 County Hwy T
Whitelaw, WI 54247
(920) 732-3619

Dated: May 27, 2005

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE